

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CUNA MUTUAL LIFE INSURANCE  
COMPANY, an Iowa corporation,

Plaintiffs,

v.

JACK NORWOOD, an individual, together  
with JANE DOE NORWOOD, and the  
marital community comprised thereof,

Defendants.

Case No. CV06-5353

ORDER GRANTING MOTION FOR  
REMAND

THIS MATTER is before the court on Defendants' Motion for Remand. [Dkt. #5]. Defendants request this Court remand this matter back to the Superior Court of Clark County on the grounds that removal is improper and the Court does not have subject matter jurisdiction. Plaintiff /Counterdefendant CUNA Mutual Life Insurance Company (CUNA) argues that removal was proper and its voluntary action of dismissing its state law claim is not a bar to this Court's subject matter jurisdiction.

Any civil action commenced in state court is removable if it might have been brought originally in federal court. 28 U.S.C. §1441(a). Removal statutes are construed restrictively, so as to limit removal jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). Doubts as to removability are resolved in favor of remanding the case to the state court. *Id.*

The dispositive question for purposes of this Motion is whether or not CUNA is a "defendant" for removal purposes. The right to remove a case from state to federal court is vested exclusively in "the defendant." 28 U.S.C. §1441(a). A plaintiff who has chosen to commence the action in state court cannot

1 later remove to federal court, even to defend against a counterclaim. *Southland Corp. v. Etridge*, 456 F.Supp.  
2 1296, 1300 (9<sup>th</sup> Cir. 1978). Although Defendants filed a counterclaim, placing Plaintiff is a defensive posture,  
3 whether or not a case is removable is based on the Plaintiff's complaint and the positions of the parties at that  
4 time. Plaintiff is not a "defendant" for purposes of removal. Plaintiffs cannot remove, even when they are in  
5 the position of a defendant with regard to a counterclaim asserted against them. *Ballard's Service Center Inc.*  
6 *v. Transue*, 865 F.2d 447, 449 (1<sup>st</sup> Cir. 1989) (citing 14 A.C. Wright, A. Miller & E. Cooper, *Federal Practice*  
7 *and Procedure* §3731 (2d. 1985)).

8 Plaintiff asserts that the removability of this case is governed by the "voluntary/involuntary" rule.  
9 Under this rule, a district court can properly exercise removal jurisdiction over an action commenced in state  
10 court, where no federal jurisdiction existed originally but a voluntary act taken by the Plaintiff renders the case  
11 removable. *People of the State of Cal. v. Keating*, 986 F.2d 346, 348 (9<sup>th</sup> Cir. 1993). Plaintiff argues that  
12 because the dismissal of its claims was voluntary, and the voluntary dismissal left only Defendants'  
13 counterclaims which are completely preempted by a federal statute, the case was rendered removable to federal  
14 court. While this may be true, it does not change the fact that Plaintiff is still not a "defendant" for purposes  
15 of removal jurisdiction, thus removal was not proper.

16 Ordinarily, determining whether a particular case arises under federal law, permitting removal to federal  
17 court, turns on "well-pleaded complaint" rule. *AETNA Health Inc. v. Davila*, 542 U.S. 200, 207 (2004). An  
18 exception to the well-pleaded complaint rule permits removal of action to federal court when federal statute  
19 wholly displaces state law case of action. *Id.* at 207. Plaintiff contends that because the counterclaim is for  
20 denial of benefits under a pension plan and a long term disability plan, the claim is governed by ERISA  
21 §501(a)(1)(B). This federal statute "completely preempts" any state law claim or remedy based on wrongful  
22 withholding of benefits or denial of coverage promised under an ERISA plan. *Id.* at 221. Complete  
23 preemption operates to confer original federal subject matter jurisdiction notwithstanding the absence of a  
24 federal cause of action on the face of the complaint. *Bauman v. U.S. Healthcare, Inc.*, 193 F.3d 151, 160 (3<sup>rd</sup>  
25 Cir. 1999). The complaint in this case was not based on the wrongful withholding of benefits or denial of  
26 coverage promised under an ERISA plan. Although ERISA may preempt Defendant's counterclaim, it does  
27 not preempt the claims on the face of the complaint, which although dismissed, still governs the removability  
28 of the case. Even if subject matter jurisdiction does exist under federal question jurisdiction, the claim can still

1 be heard in state court; state courts and federal courts have concurrent jurisdiction of claims made by plan  
2 beneficiaries for benefits. 29 U.S.C. §1132(e)(1); 29 U.S.C. §1132 (a)(1)(B).

3 In the alternative, Plaintiff argues that the Court has subject matter jurisdiction based on the diversity  
4 of the parties. Although there does appear to be diversity jurisdiction in this case,<sup>1</sup> Plaintiff was not authorized  
5 to remove the case to federal court. Removal was not proper and even if subject matter jurisdiction exists,  
6 state courts have general jurisdiction and therefore the authority to hear these claims unless properly removed  
7 by Defendants.

8 For the above reasons, the Defendants' Motion for Remand is GRANTED.

9 IT IS SO ORDERED.

10 DATED this 28<sup>th</sup> day of July, 2006

11  
12  
13   
14 RONALD B. LEIGHTON  
UNITED STATES DISTRICT JUDGE  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

---

26 <sup>1</sup>The parties are diverse in this case; Plaintiff is an Iowa corporation and Defendants are residents of Washington State.  
27 [Dkt. 4-3, Plaintiff's Complaint, ¶1,2]. The amount in controversy also appears to be met. The complaint alleged the property  
28 to be valued at \$250,000 or more. [Dkt. #4-3, Plaintiff Complaint, ¶44].